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No. 05-1565

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In the Supreme Court of the United States

DANIEL LEE MERRILL, SR.,
Petitioner,

v.

BURKE E. PORTER MACHINERY COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

ROBERT J. ELEVELD
Counsel of Record

MARY C. BONNEMA
SARA L. RICKSON
McGARRY BAIR PC
171 MONROE AVENUE, SUITE 600
GRAND RAPIDS, MI 49503
(616) 742-3500

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

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INTRODUCTION

Pursuant to Supreme Court Rule 44, Petitioner Daniel Merrill ("Mr. Merrill") respectfully petitions the Court for rehearing of its judgment and decision issued on October 2, 2006. Mr. Merrill makes this request because eight additional RIF cases have been decided in the Sixth Circuit since Mr. Merrill filed his Petition for Writ, cases that directly contradict the standard applied in Mr. Merrill's suit. In all of these new cases, the Sixth Circuit applied a modified *McDonnell Douglas* test; a test that Mr. Merrill submits should have been applied by the District Court for the Western District of Michigan and the Sixth Circuit Court of Appeals instead of the rigid *McDonnell Douglas* test actually applied.

Mr. Merrill's Petition for Rehearing is not meant to reargue that which is in the Petition for a Writ of Certiorari denied on October 2, 2006. Instead, these new cases evidence a change in the law of the Sixth Circuit, a change that occurred during the pendency of Mr. Merrill's appeal and a change that should be applied to his case. At the very least, these new cases underscore the need for clarification and crystallization of the standard to be applied in discriminatory discharge cases involving RIFs. The change in the law is important enough in its own right to warrant reconsideration of this Court's prior ruling.

BRIEF STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case involves an individual, Petitioner Daniel Merrill ("Petitioner Merrill") who was discriminatorily terminated from his position by his employer, Burke E. Porter Machinery Co. ("BEPCO") because he suffers from a disability known as Asperger's syndrome. Notably, during the time Petitioner Merrill was improperly terminated because

of his disability, BEPCO laid off a number of other employees due to a reduction in workforce (RIF). Because of that RIF, no replacement was hired to fill Plaintiff Merrill's position. As such, he was obviously unable to prove his prima facie case under a rigid application of the *McDonnell Douglas* test which required that Mr. Merrill actually show that he was replaced by someone who was not in his protected class.

Importantly, both the U.S. District Court for the Western District of Michigan (U.S. Magistrate Judge Joseph G. Scoville) and the Sixth Circuit Court of Appeals strictly construed this Court's seminal *McDonnell Douglas* test to require that Petitioner Merrill actually show that he was replaced by someone. The District Court applied the *McDonnell Douglas* burden-shifting framework, holding that a prima facie case of discrimination under applicable Sixth Circuit law required that a plaintiff prove that "the disabled individual was replaced." (Petition for Writ App. "App.") 119a). Again, because undisputed evidence existed that he was never replaced, the District Court determined that Plaintiff Merrill could not sustain a prima facie case of discrimination. (App. 119a-120a), relying on *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1185 (6th Cir. 1996). The Sixth Circuit affirmed the decision of the District Court, holding that Plaintiff Merrill's failure to satisfy the replacement prong of the *McDonnell Douglas* test was fatal to his case (App. 10a n.2), even though the case involved a RIF in which employees are not normally replaced. Each court specifically held that Mr. Merrill must show he was replaced regardless of the fact that he was terminated during a reduction in workforce situation.

Moreover, since Mr. Merrill first filed his Petition for Writ on June 6, 2006, the Sixth Circuit Court of Appeals and its lower courts decided eight cases that directly conflict with

the rigid application of the *McDonnell Douglas* test that was applied in Mr, Merrill's case. Four cases were decided by the Sixth Circuit Court of Appeals itself: (1) *Bender v. Hecht's Dep't Stores*, 455 F.3d 612 (6th Cir. *decided* August 1, 2006); (2) *Suits v. The Heil Co.*, 2006 U.S. App. LEXIS 20146 (6th Cir. *decided* August 3, 2006); (3) *Smith v. Allstate Ins. Co.*, 2006 U.S. App. LEXIS 21161 (6th Cir. *decided* August 16, 2006); and (4) *Wu v. Tyson Foods, Inc.*, 2006 U.S. App. LEXIS 16274 (6th Cir. *decided* June 22, 2006).

Four more cases were decided by the district courts of the Sixth Circuit, including a case that applied a modified *McDonnell Douglas* test in a ADA discharge involving a RIF: (1) *Skelton v. Sara Lee Corp.*, 2006 U.S. Dist. LEXIS 52482, 9-11 (S.D. Ohio *decided* July 31, 2006); (2) *Schirmer v. Enerfab, Inc.*, 2006 U.S. Dist. LEXIS 64344, 13-14 (S.D. Ohio *decided* September 8, 2006); (3) *Craig v. Cont'l Pet Techs., Inc.*, 2006 U.S. Dist. LEXIS 70287, 19-20 (E.D. Ky. *decided* September 26, 2006); and (4) *Vehar v. Cole Vision Corp.*, 2006 U.S. Dist. LEXIS 72978 (N.D. Ohio *decided* October 5, 2006). This is a significant number of cases to have been decided in one Circuit in a mere five months. More importantly, these cases, when compared to the hodgepodge of Sixth Circuit cases that previously addressed this issue, make it apparent that the Sixth Circuit is still confused about the proper standard to apply in RIF situations involving discriminatory discharges. It further suggests that a change in law may have occurred during the pendency of Mr. Merrill's appeal, a change that should rightfully apply to Mr. Merrill's suit.

ARGUMENT

The holdings by the District Court for the Western District of Michigan and by the Sixth Circuit Court of Appeals are in direct conflict with the standards applied in many of the cases decided after Mr. Merrill's case, cases in which the courts recognized the need for clarity on the proper application of the *McDonnell Douglas* test in RIFs. This Petition for Rehearing should be granted to provide the critical clarification obviously needed within the Sixth Circuit on the proper application of the burden-shifting analysis for discriminatory discharge cases.

On four occasions since June 6, 2006, the Sixth Circuit has addressed a modified *McDonnell Douglas* test in a RIF situation. While none of these cases are ADA cases, they all involved discriminatory discharges during a RIF. Moreover, all eight cases decided in the Sixth Circuit after June 6, 2006, have applied a modified *McDonnell Douglas* test.[1] This clearly shows a change in the law applied by the Sixth Circuit in RIF situations since Petitioner Merrill's case was decided.

Right after Mr. Merrill filed his Petition for Writ of Certiorari, the Sixth Circuit Court of Appeals in *Wu v. Tyson Foods, Inc.*, 2006 U.S. App. LEXIS 16274 (*decided* June 22, 2006) (unpublished), held that to meet the *McDonnell Douglas* test in a Title VII race discrimination RIF case a modified version could be proved. The Sixth Circuit applied the *Mc Donnell Douglas* test, opining that the plaintiff had to at least prove the "modified" version of the fourth prong.[2]

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[1] In *Suits v. The Heil Co.*, 2006 U.S. App. LEXIS 20146, the court only applied a modified *McDonnell Douglas* test because it desired to give the plaintiff the benefit of the doubt in light of the lack of clear precedent on this issue.

[2] The Fourth prong of the *McDonnell Douglas* test is commonly referred to as the replacement prong.

The *Wu* court decided that under the fourth prong of the burden-shifting test the plaintiff had to show that his "position remained open" after his discharge or, at a minimum that he was singled out "for discharge for impermissible reasons." The court cited *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 371 (6th Cir. 1999), "explaining that the fourth prong of the prima facie case is modified when the employee is dismissed due to a reduction-in-force 'because in a reduction-of-force situation the plaintiff is not in fact replaced.'" *Wu*, at *16.

Just over a month later, the Sixth Circuit (in a published case) modified the fourth prong of the *McDonnell Douglas* test in *Bender v. Hecht's Dep't Stores*, 455 F.3d 612 (6th Cir. *decided* August 1, 2006). The *Bender* court considered a claim under the ADEA for discriminatory discharge that occurred during a RIF. The court held that a plaintiff must satisfy the familiar burden-shifting framework set out in *McDonnell Douglas* ***as modified for workforce-reduction cases.*** The court stated that "[i]n 'reduction in force' cases like this one, the fourth prong [of the *McDonnell Douglas* test] is modified so that the plaintiffs must provide 'additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.'" *Id.* at 620 (citing *Rowan v. Lockheed Martin Energy Sys.*, 360 F.3d 544 (6th Cir. 2004)).

Two days later, the Sixth Circuit Court of Appeals again applied the *McDonnell Douglas* test, this time in a Title VII sex discrimination case involving a RIF. *Suits v. The Heil Co.*, 2006 U.S. App. LEXIS 20146 (*decided* August 3, 2006) (unpublished). The *Suits* court expressly acknowledged that the application of the fourth prong of the *McDonnell Douglas* test was unclear in this context. Thus, it decided to merely adopt the district court's approach in the case because it was

reasonable. The district court's approach was a type of modified fourth prong of the *McDonnell Douglas* test, about which the Sixth Circuit commented as follows:

> . . . the content of this fourth prong in RIF cases is not wholly clear. In order to give the plaintiff the benefit of the doubt in the absence of clear direction from precedent, the district court found that 'Plaintiff's direct evidence of discrimination (i.e. Nehrkorn's two sets of lunch comments) is sufficient to satisfy the fourth prong of her prima facie case.' Perhaps by way of explanation of its favoring the plaintiff in this particular, the court cited *Burdine* at 253 for the proposition that the 'burden of establishing a prima facie case of disparate treatment is not onerous.' We decline to rule that evidence (e.g., the lunchtime comments) that failed to satisfy the direct evidence requirement in employment discrimination cases will necessarily or even usually satisfy the fourth prong of the circumstantial evidence analysis.

That the Court of Appeals thought there was neither Sixth Circuit precedent nor Supreme Court precedent is a testament to the confusion about the proper application of the law in RIF cases. It is also a testament to a change in law during the pendency of Mr. Merrill's appeal, a change of law that should rightly change the outcome of Mr. Merrill's suit.

Fourteen days later, in *Smith v. Allstate Ins. Co.*, 2006 U.S. App. LEXIS 21161, (*decided* August 16, 2006) (unpublished), the Sixth Circuit Court of Appeals applied the *McDonnell Douglas* burden shifting test in a Title VII and ADEA case involving a RIF. This time the Sixth Circuit more clearly adopted a modified test in a RIF situation by stating that, "in RIF cases the fourth prong is modified to require the plaintiff to show that the employer singled her out for

discharge for impermissible reasons, as the employee is not "replaced" after a RIF." *Id.* at *14 (citing *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990) and *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350 (6th Cir. 1998)). Notably, the *Smith* court Appeals did not merely adopt the standards of the district court but enunciated its own reasons for adopting the modified test. This decision evidences not only a recent change in direction of the law (a change that occurred during the pendency of Mr. Merrill's appeal), but it also amplifies the conflict in the Sixth Circuit on this issue under prior decisional law.

Beyond the four cases already cited in which the Sixth Circuit Court of Appeals applied a modified *McDonnell Douglas* test in a reduction in workforce situation, four district courts in the Sixth Circuit entered rulings on whether a modified test should be applied in the RIF context. In each case, the court held that a modified *McDonnell Douglas* test should be used in situations involving a discriminatory discharge during a RIF. For example, in *Skelton v. Sara Lee Corp.*, 2006 U.S. Dist. LEXIS 52482 (S.D. Ohio *decided* July 31, 2006), the District Court for the Southern District of Ohio held that a modified *McDonnell Douglas* test should be applied in ADEA cases involving RIFs. The *Skelton* court determined that when an employee is terminated during a RIF, the fourth prong of the McDonnell Douglas test is changed. *Id.*, at *10 (citing *Barnes*, 896 F.2d at 1465, n.1). The *Skelton* court reasoned that "the fourth element is modified because the employer does not replace the employee." *Id.* at *10 (citing *Godfredson*, 173 F.3d at 371). The court instead modified the fourth prong to require the plaintiff to show "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out [the plaintiff] for discharge for impermissible

reasons." *Id.*, at *10-11 (citing *Godfredson*, 173 F.3d at 371 and *Barnes*, 896 F.2d at 1465).

On September 8, 2006 the District Court for the Southern District of Ohio applied a modified *McDonnell Douglas* test in an ADA RIF case, which is precisely the same type of case at bar. *See Schirmer v. Enerfab, Inc.*, 2006 U.S. Dist. LEXIS 64344 (S.D. Ohio 2006). This court's decision directly contradicts the standard applied by its sister court in the case at bar. The *Schirmer* court explained that, under the *McDonnell Douglas,* analysis the plaintiff did not have to show she was replaced, but rather that "additional direct, circumstantial, or statistical evidence tending to indicate that [the employer] singled out [the employee] for discharge because of her disability. *Id.*, at *13 (citing *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996) and *Kvintus v. R.L. Polk & Co.*, 194 F.3d 1313 (6th Cir. 1999)). The *Schirmer* court reasoned that the employee's position was eliminated through an organizational restructuring, her job functions continued to be performed by other existing personnel, and the employee would be unable to demonstrate the traditional replacement prong because it had previously been found by the Sixth Circuit Court of appeals that "a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work." *Id.* (citing *Barnes*, 896 F.2d at 1465). The court held that in such situations, "the plaintiff may substitute 'additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.'" *Id.* (citing *Kvintus*, 194 F.3d 1313).

In late September, the District Court for the Eastern District of Kentucky in *Craig v. Cont'l Pet Techs., Inc.*, 2006 U.S. Dist. LEXIS 70287, 19-20 (E.D. Ky. *decided*

September 26, 2006), applied a modified *McDonnell Douglas* test in a Title VII case involving a RIF. The district court relied on Sixth Circuit precedent to find that a modified test should be used. Specifically, the district court ruled that, in a reduction in force case, the fourth prong is modified and the plaintiff must instead submit "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Id.*, at *20 (citing *Rowan*, 360 F.3d at 548).

Then, earlier this month, the Northern District of Ohio decided in *Vehar v. Cole Vision Corp.*, 2006 U.S. Dist. LEXIS 72978 (N.D. Ohio *decided* October 5, 2006), that "the *McDonnell Douglas* framework used to analyze discrimination claims 'changes in the context of a work force reduction.'" *Id.*, at *37 (citing *Barnes*, 896 F.2d at 1465 n.1). The district court explained that in a RIF case "the fourth element of *McDonnell Douglas* is modified because the employer does not replace the employee with someone outside the protected class. *Id.* (citing *Godfredson*, 173 F.3d at 371). The district court found that a RIF situation occurs when, "business considerations cause an employer to eliminate one or more positions within the company." *Id.* The district court followed Sixth Circuit precedent and held that prong was modified to require that the plaintiff present "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Id.*, at *38 (citing *Godfredson*, 173 F.3d at 371).

All of the above district court cases applied a standard that is directly opposite of that employed by the Western District of Michigan in deciding the case at bar. These recent cases directly conflict with a rigid application of the *McDonnell Douglas* test, a standard that was applied by the Sixth Circuit

in Mr. Merrill's case, and demonstrate that a continued conflict exists about the application of the McDonnell Douglas burden-shifting test in discriminatory discharges occurring during a RIF. The cases also emphasis the fact that a change in law has occurred, and it occurred during the pendency of Mr. Merrill's appeal on this issue.

As can be seen from all of the cases discussed above, the Sixth Circuit Court of Appeals and the lower District Courts of the Sixth Circuit have more recently applied a modified *McDonnell Douglas* test in a RIF situation and, as such, it is now the precedent in the Sixth Circuit. This change in the law merits further review by this Court. If nothing else, cases decided by the Sixth Circuit Court of Appeals and district courts within the Sixth Circuit both before and after the decisions rendered in Petitioner Merrill's case are in direct conflict with each other. Such varied applications of *McDonnell Douglas* and such a wide divergence in holdings shows that the Sixth Circuit is internally conflicted on this point, substantiating the need for clarification. For all of these reasons, Mr. Merrill's Petition for rehearing should be granted not only because of the change in the law, but also because the Sixth Circuit has inconsistently applied the *McDonnell Douglas* test in the RIF context, leading to conflicting results based on differing legal standards.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that his Petition for Rehearing be granted.

As an alternative to this Court granting a Petition for Rehearing, Petitioner respectfully requests that this case be remanded to the Sixth Circuit Court of Appeals for reconsideration in light of the recent cases decided in that Circuit, which have been cited in this petition, regarding a modified RIF analysis.

Respectfully submitted,

McGarry Bair PC
Attorneys for Plaintiff
Daniel Lee Merrill, Sr.

Date: October 27, 2006

Robert J. Eleveld (P13142)*
Mary C. Bonnema (P48789)
Sara L. Rickson (P69290)
Business Address and Telephone:
171 Monroe Avenue N.W.
Suite 600
Grand Rapids, Michigan 49503
(616) 742-3500

**Counsel of Record*

Certification of Counsel (Rule 44)

As counsel for petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay.

Dated: October 27, 2006

Robert J. Eleveld

Robert J. Eleveld
Counsel for Petitioner